Supreme Court, U.S.
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85-2129

CASE NO. A-796

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

JOSEPH B. BERGEN, J.D., Attorney at Law, Individually, and on Behalf of All Other Attorneys in the State of Georgia Similarly Situated,

Appellant,

VS.

MARTINDALE-HUBBELL, INC.,

Appellee.

JURISDICTIONAL STATEMENT

ON APPEAL FROM
THE COURT OF APPEALS
AND
THE SUPREME COURT OF GEORGIA

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I

QUESTIONS PRESENTED

This case involves a decision of the Court of Appeals of Georgia that the Supreme Court of Georgia refused to review which is contrary to the provisions and requirements of the Fair Credit Reporting Act codified in Title 15, USC, Section 1681, et seq. and the decision is against the validity and requirements of the Act.

The question presented is whether the Fair Credit Reporting Act applies to practicing lawyers, that is, whether the Appellee Martindale-Hubbell, Inc. is required to produce their file on the Appellant, Joseph B. Bergen, a lawyer, showing the basis of the rating of the Appellant's legal ability published in their Legal Directory when a proper demand for inspection of this file is made under the provisions of the Act.

II

TABLE OF CONTENTS

		Page
I	Questions Presented.....	1
II	Table of Contents.....	i
III	Opinion Below.....	2
IV	Jurisdiction.....	2
V	Statutes Involved.....	5
VI	Statement of the Case.....	6
VII	Reasons Why Questions Presented are Substantial....	17

Appendix A, Order on Motion for Judgment on Pleadings

Appendix B, Order on Motion for Partial Judgment on Pleadings

Appendix C, Opinion Below

Appendix D, Order by Court of Appeals of Georgia denying Rehearing

Appendix E, Notice from Supreme Court of Georgia denying Writ of Certiorari

APPENDIX F, Notice from Supreme Court of

Georgia denying Rehearing

Appendix G, Notice of Appeal to the Supreme Court of the United States

Appendix H, Amendment to Notice of Appeal to the Supreme Court of the United States

Appendix I, Entry of Appearance in United States Supreme Court

Appendix J, Order Extending Time for Docketing Appeal in the Supreme Court of the United States

Appendix K, Statutes Involved

Appendix L, Proof of Filing and Service of this Judicial Statement

TABLE OF AUTHORITIES

Code Sections	Page
Title 28 USC Section 1257(1).....	5
Title 15 USC Section 1681, et seq...	Appendix K

Cases

Bergen v. Martindale-Hubbell, Inc., 245 Ga. 742 (1980) 267 SE 2d 10....	6
Bergen v. Martindale-Hubbell, Inc.,	

248 Ga. 599 (1981), 285 SE 2d 6.... 8
Hoke v. Retail Credit Corp.,
521 F.2d 1071, cert. den. 1976 S.Ct.
76 (1976)..... 17
Belshaw v. Credit Bureau of Prescott,
372 F.2d 1356, 1359-1360..... 18
Bones v. Alcala,
420 US 575, 580-581 (1975)..... 18
Federal Trade Commission v. Manger
Retail Credit Corp., 15 F.2d 988,
995 (D.C. Cir. 1975)..... 19
Greenway v. Information Dinamic, Ltd.,
359 Supp. 1092, 1095..... 19
Bresh v. Retail Credit,
359 F.Supp., 26 C.D. Cal.(1973).... 19
Porter v. Talbort Perkins Childrens
Services, 355 F.Supp. 174, 177
(SDNY, 1973)..... 20
Arsor v. Retail Credit Corp.,
544 P.2d 1041, 1045 (1976)..... 20
Connoly v. Southern Import Sales,
382 F.Supp.121 (ND Ala.1974)..... 21
Blecker v. Drury,
149 F.2d 770 (2d Cir. 1945)..... 21
Kirhneman v. Humble Oil and Refining
Co. 312 F. Supp. 34 (D.C. Calif.
1970)..... 21
Olinger v. American Savings and Loan
Assoc., 409 F.2d 142 (D.C. Cir.
1969)..... 21
Afro-American Publishing Co. v. Jaffe,
366 F. 2d 649, 650 (D.C. Cir. 1966).21
Virginia Board of Pharmacy v.
Virginia Citizens Consumer
Counsel, Inc., 445 US 746 (1979)... 22
Central Hudson Gas and Electric
Corp. v. Public Service Commission
of New York, 447 US 557 (1980)..... 22
Harvard Law Review,
(94 Harv. L. Rev. 1)..... 22

III

OPINION BELOW

Decision of the Court of Appeals of Georgia dated October 23, 1985 (Appendix A, infra), reported in 176 Georgia Appeals 745, 337 S.E.2d 770 (1985); Motion for Rehearing in the Court of Appeals of Georgia, denied on November 7, 1985 (Appendix B); Application for the Writ of Certiorari, denied, with one dissent, by the Supreme Court of Georgia on January 8, 1986 (Appendix C); and, Motion for Rehearing on this Writ, denied on January 28, 1986 (Appendix D).

IV

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

(a) Nature of the Proceedings.

This is an Appeal from a decision of the Court of Appeals of Georgia that denied a right of action by Appellant Joseph B. Bergen, a practicing lawyer in

the State of Georgia [Bergen], against Appellee Martindale-Hubbell, Inc., publisher of a National and International Legal Directory [Martindale], as a result of Martindale's refusal to produce its file on Bergen from which Martindale determined the legal ability rating to be assigned to Bergen, so as to allow Bergen to determine the correctness of the basis of this rating and also to determine if Martindale libeled Bergen in their publication of this rating.

(b) Judgment sought to be reviewd.

The Trial Court, the Superior Court of Chatham County, Georgia, entered a final Order on January 21, 1985, without Opinion, sustaining Martindale's Motion for Judgment on the Pleadings and also entered an Order, also without Opinion, on the same date denying Bergen's Motion for Partial Judgment on the Pleadings

from which final Orders Bergen appealed to the Court of Appeals of Georgia.

The Court of Appeals of Georgia in a decision rendered on October 23, 1985 upheld the above Orders of the Trial Court.

The Court of Appeals of Georgia held that Bergen did not seek information from Martindale that includes the "general reputation" of Bergen as required of a "consumer reporter" under Section 1681(d) of the Fair Credit Reporting Act that would place the publication by Martindale within the definition of a "consumer reporting agency" under Section 1681(a) and (f) of the Act, since the rating of Bergen's "legal ability" does not purport to concern any aspect of his "general reputation".

The Court of Appeals also denied Bergen's libel claim since this libel claim is based on a publication of an

opinion of his legal ability, rather than conclusions reached by Martindale and published by Martindale contrary to those opinions, as contended by Bergen, that an examination of Martindale's files on Bergen may refute.

(c) Jurisdiction.

The jurisdiction of the Supreme Court of the United States is conferred by Title 28 USC Section 1257(1) relating to the validity of the Fair Credit Reporting Act codified in Title 15 USC Section 1681, et seq.

V.

STATUTES INVOLVED

The Statutes involved are 62 Stat. 929 and 84 Stat. 590, codified in Title 28 USC Section 1257(1), and 84 Stat. 1128, codified in Title 15 USC Section 1681, et seq., set forth in Appendix D to this Jurisdictional Statement.

VI.

STATEMENT OF THE CASE

The Appellant Bergen, as a member of the State Bar of Georgia, filed a Complaint on December 18, 1978 in the Superior Court of Chatham County against Appellee Martindale and their then Georgia Field Representative, Samual H. Forbes, alleging a class action brought on behalf of himself and all other individual attorneys at law similarly situated with Bergen admitted to practice and practicing law before the courts of the State of Georgia who are listed in the Law Directory published by Martindale.

The defendant Forbes was dismissed as a party defendant on February 20, 1979 with this dismissal being upheld by the Supreme Court of Georgia on April 23, 1980 on the ground of improper venue. Bergen v. Martindale-Hubbell, Inc., 245

Ga. 742, rehearing denied May 7, 1980, 267 SE 2d 10, and is not involved here.

Count I (Part VII of the Complaint) alleged Restraint of Trade and Libel by Martindale as a result of the manner Martindale publishes ratings of lawyers in their Law Directory that purports to show their relative legal abilities.

Count II (Part VIII of the Complaint) alleged a violation of the Fair Credit Reporting Act by Martindale in refusing to allow plaintiff to inspect the file on plaintiff that purports to be the basis for a rating of Bergen's legal ability by Martindale.

The allegation of Count I seeking damages for Restraint of Trade was withdrawn at a Trial Court Status Conference on April 19, 1984.

Count III (Part IX of the Complaint), seeking Declaratory Judgment and Count IV (Part X of the Complaint)

seeking Injunctive Relief were previously dismissed on Motion for Partial Judgment on the Pleadings. The dismissal of these Counts was affirmed on appeal to the Supreme Court of Georgia. Bergen v. Martindale-Hubbell, Inc., 248 Ga. 599(1981),285 SE 2d 6, and also are not involved here.

Thereafter the remaining claims of libel set out in Count I of the Complaint and violations of the Fair Credit Reporting Act set out in Count II were addressed by the Trial Court in a Motion for Judgment on the Pleadings filed by Martindale and a Counter Motion for Partial Judgment on the Pleadings on Count II as to liability of Martindale for violations of the Fair Credit Reporting Act filed by the Bergen. The Trial Court entered final Orders on January 21, 1985 granting Martindale's Motion for Judgment on the Pleadings and

denying Bergen's Motion for Partial Judgment on the Pleadings as to Liability on Count II.

The Answer filed by Martindale admitted that it is a commercial publishing house engaged in the business of compiling, publishing and distributing a law list and directory of attorneys who are assigned a "rating" as to their legal ability of "a" "very high"; "b" "high"; "c" "fair"; or, no assigned rating at all as to legal ability.

Bergen at all relevant times has been listed with a "b" rating, although for a period of years between 1965 and 1975, when the plaintiff had an on-going active dispute with Martindale concerning his rating, as set out in his Complaint, Martindale refused to publish a Biographical Listing on Bergen even though a lawyer is entitled to a Biographical Listing if he has a "b"

rating.

Bergen complains that Martindale refused to assign him an "a" rating, notwithstanding Martindale having a acknowledged that Bergen possessed a "very high" legal ability since, as stated by the then Vice President of Martindale, Mr. William Hildebrand, Jr., during a telephone conversation with plaintiff on October 19, 1965, Bergen's "fuse was too short" and this irritated certain local counsel in the Savannah, Georgia area from whom Mr. Hildebrand said Martindale had sought an opinion as to whether Bergen should have an "a" rating. Mr. Hildebrand also stated that the Biographical Card on Bergen had beer discontinued because Bergen was not as "considerate" to his collegues as he should be and that opposing counsel in the Savannah community were "offended" by his "disposition" while representing

clients against them. Following this ten year period that Martindale refused to publish this Biographical Section on Bergen, Martindale advised Bergen in a letter dated October 22, 1975 that it had "decided" to once again publish a Biographical Section for Bergen, but with Bergen still retaining a "b" rather than an "a" rating, with the "admonition" given Bergen by Mr. Hildebrand, in a telephone conversation on that same date, that he should be more "courteous" to his fellow attorneys by "lengthening his fuse" a little bit or Bergen may not retain the "privilege" of having a Biographical Section published by Martindale and that Bergen would never get an "a" rating from Martindale as this "a" was being withheld from Bergen because of his "personality" and not because of a lack of his "very high" legal ability. The foregoing was recited

in Bergen's Complaint.

Mr. Hildebrand again advised Bergen on March 28, 1977 that he had not received a "a" rating because Bergen still "offended" some of his fellow attorneys in his "personal" contacts with these lawyers during trials and other professional communications, rather than because of his lack of a "very high" legal ability. This, too, is recited in the Complaint.

Bergen alleges that Martindale failed to disclose the nature and substance of the information in its files on Bergen, together with the source of this information, in violation of 15 USC Section 1681(g) and 1681(h), so as to give Bergen an opportunity to correct any incorrect information, as he had a right to do under the Act.

Bergen filed Interrogatories with his Complaint requesting production of

copies of documents showing information in the reports obtained by Martindale supporting or in any way relating to his "b" rating; the reasons why Martindale ceased to publish Bergen's Biographical Data; the names and addresses of persons contacted regarding Bergen's rating; the reasons why Martindale decided to republish Biographical Data on Bergen; requesting a statement as to whether Mr. Hildebrande had a telephone conversation with Bergen on August 22, 1975 that was confirmed by letter dated August 26, 1975 during which Mr. Hildebrand asked if he could be "candid" with Bergen followed by the statement from Mr. Hildebrand that Bergen should be "more courteous" to his fellow lawyers by "lengthening his fuse a little bit"; whether Martindale had received an additional reports and recommendations on Bergen from 1975 to the date of filing the Complaint and

seeking the names and addresses of the parties making such reports or recommendations and stating the ratings given Bergen by each of the lawyers making these reports and whether all lawyers practicing in Savannah, Chatham County, Georgia were solicited for their recommendations and, if not, why the lawyers who were not solicited were excluded; and, if Martindale had received recommendations on plaintiff that he be given an "a" rating from the then President of the American Bar Association, former Presidents of the former Georgia Bar Association, former Presidents and President-elect of the State Bar of Georgia and from any member of the House of Delegates of the American Bar Association, from the President and former Presidents of the Savannah Bar Association and from any Judge or former Judge of the Court of Appeals of Georgia

and of the Superior Court of Chatham County, Georgia, and, if so, what weight were given each of these reports and the determination by Martindale not to give Bergen an "a" rating, notwithstanding the fact that these recommendations from these parties were that Bergen be given an "a" rating.

Martindale filed Answers to other Interrogatories propounded but objected and refused to answer the foregoing questions.

Bergen alleged in his Complaint and Martindale admitted in its Answer that plaintiff wrote Martindale a letter dated July 15, 1977 requesting an opportunity to examine information in his file to which Bergen claimed he was entitled to do under the provisions of the Fair Credit Reporting Act and that Martindale refused to allow this examination or disclose this information to Bergen.

Bergen also asserted that the rating system administered by Martindale, under which Bergen was given a "b" rating, as opposed to an "a" rating, libeled and defamed Bergen in a manner that was intended to injure his reputation as an attorney with reference to his profession as a lawyer.

All of the questions sought to be reviewed here were raised, first, in the Superior Court of Chatham County in the Motion by Bergen for Partial Judgment on the Pleadings as to Libility and, next, in the Court of Appeals of Georgia in the Enumeration of Errors filed by Bergen and, finally, in the Supreme Court of Georgia in Bergen's Application for the Writ of Certiorari from the Supreme Court of Georgia to the Court of Appeals of Georgia in questions presented to the Supreme Court of Georgia.

VI

STATEMENT OF REASONS WHY QUESTIONS PRESENTED ARE SUBSTANTIAL

The question presented on this Appeal relating to the application of the Fair Credit Reporting Act to lawyers has never been passed upon by this Court and is of great public importance to the citizens of not only the State of Georgia but all the other States of this Union as well.

The issues involved in this Appeal are similar to those decided by the Fourth Circuit (1975) in Hoke v. Retail Credit Corp., 521 F.2d 1071, cert. den. 1976 S.Ct. 76 (1976), involving a physician, that expanded the definition of a "consumer report" within the meaning of the Fair Credit Reporting Act to virtually any information communicated by a "consumer reporting agency" for any one of the purposes enumerated in the

Act. The Hoke decision reiterated the holding in Belshaw v. Credit Bureau of Prescott, 372 F.2d 1356, 1359-1360, that defined "consumer report" to be interpreted to mean any report made by a reporting agency concerning information that could be used for one of the purposes enummerated in 15 USC 1681(a).

Both the Belshaw and Hoke courts made specific references to "one of the purposes enummerated in the Act" and it noted that "employment" is, in fact, one of the purposes listed in the Fair Credit Reporting Act. It is with this purpose of employment listed in the Act that the crux of Bergen's case rests.

In determining the applicability of the Fair Credit Reporting Act to various reporting agencies the Supreme Court of the United States has stated in interpreting a Statute that words "are given their ordinary meaning", Bones v.

Alcala, 420 US 575, 580-581, 43 L.Ed. 2d 469, 95 S.Ct. 1180 (1975). The District of Columbia Circuit has also held that where the language of the provision of an Act is clear, the words employed are to be considered the final expression of the Legislative intent. Federal Trade Commission v. Manger, Retail Credit Company, 15 F.2d 988, 995 (D.C.Cir. 1975).

The concept of placing Martindale-Hubbell Law Directory within the scope of the Fair Credit Reporting Act is further supported by courts which have held that information about a "consumer", which a "reporting agency" knows or expects to be used in connection with a business transaction, is a "consummer report" under the Act. Belshaw, supra.; Greenway v. Information Dinamic, Ltd., 359 Supp. 1092, 1095; Bresh v. Retail Credit, 359 F.Supp., 26

C.D. Cal.(1973).

The decision of Porter v. Talbort Perkins Childrens Services, 355 F.Supp. 174, 177(SDNY, 1973), stated that where an agency regularly sells consumer reports which affect commercial eligibility, that agency would properly fall within the ambit of the Act. The term "commercial availabilty" used by the Porter decision is analogous to Bergen's employment which Martindale affects by its rating.

The Fair Credit Reporting Act was adopted "to protect an individual from inaccurate or arbitrary information" about himself in a consumer report that is being used as a factor in determining the individual's eligibility for credit, insurance or employment. Arsor v. Retail Credit Corp., 544 P.2d 1041, 1045 (1976).

Regarding the issue of libel, a statement imputing want of capacity in an

attorney is actionable per se. Connoly v. Southern Import Sales, 382 F. Supp. 121(ND Ala. 1974); Blecker v. Drury, 149 F.2d 770 (2d Cir.1945); Kirhneman v. Humble Oil and Refining Co., 312 F.Supp. 34 (D.C. Calif. 1970). Furthermore a publication is considered "defamatory" if it tends to injure a person in his trade, profession, or community standing, or lowers him in the esteem of the community. Olinger v. American Savings and Loan Assoc., 409 F.2d 142 (D.C.Cir. 1969). This thought is further refined in Afro-American Publishing Co. v. Jaffe, 366 F. 2d 649, 650 (D.C.Cir. 1966), where it was held that a publication is defamatory if it tends to injure a plaintiff in his trade, profession, or community standing or lowers him in the esteem of the community, and it suffices to establish that the publication tends to lower plaintiff in the estimation of a

substantial, respected group, though they are a minority of the total community, or plaintiff's associates.

Martindale contends that is immune from a libel action as it is entitled to the Constitutional protection of free flow of commercial information that is indespensible to the formation of intelligent opinions and to enlighten public decisions as held in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc., 425 US 746, 48 L.Ed.2d 346, 96 S.Ct. 1817 (1979). Martindale also relies on the decision in Central Hudson Gas and Electric Corp. v. Public Service Commission of New York, 447 US 557, 65 L.Ed.2d 341, 100 S.Ct. 2343 (1980) analyzing commercial speech. Martindale further cites Harvard Law Review analysis of the Central Hudson case, (94 Harv. L. Rev. 1) since commercial speech does

inform people of the availability of products and services.

However, the libel issue in the present case is distinguishable from informing people of the availability of products and services, as the publication of a Law Directory that informs people in Georgia and others of whom Martindale says are "a" lawyers and who are not an "a" lawyer, with this publication then going on to state who are "b" lawyers and who are "c" lawyers and who are not even good enough, in their judgment, to have a "c" rating, is quite different. There is nothing wrong with a Legal Directory giving Biographical Data and other information that a subscriber may consider in checking on the background of perspective lawyers they may want to employ. It is the "rating" by Martindale that is offensive, or at least the denial of a lawyer, who does not have an "a"

rating, the opportunity to rebut the information furnished Martindale from which Martindale says it compiles from "selected" lawyers that Martindale's analyzes before Martindale then, in the exercise of its independent judgment, assigns a rating to a lawyer. The failure of Martindale to comply with the disclosure provisions of the Fair Credit Reporting Act not only prohibits a lawyer from responding to what Martindale says is a "consensus of an opinion" of his fellow lawyers, but prohibits a lawyer from establishing a basis for claiming that he has been libeled by Martindale in their publication.

Martindale refuses to produce its file on Bergen - a file that by its own admission consists of reports on Bergen assembled by Martindale, evaluated by Martindale and then published by Martindale - because it says the

disclosure of these evaluations of Bergen made by Martindale would almost certainly result in the destruction of Martindale's rating procedure, that Martindale points out has been operating for over 100 years - that was clearly set up or, certainly perpetuated, for the purpose of a certain group of lawyers protecting themselves and their law firms from intrusion by other lawyers, particularly other lawyers who do not represent banks, insurance companies and large corporations, and now apparently done to punish lawyers whose "fuses are too short" and who are "not considerate" to defense counsel and whose "disposition" offends opposing counsel, or who have a "personality" that does not conform to their arbitrary standards, notwithstanding a lawyer's very high legal ability and notwithstanding counsel for Martindale having admitted in judicio that Bergen is an "av" lawyer in his

judgment and in the judgment of all of his partners representing Martindale in this case. See Third Amendment to Complaint.

It is suggested that the question presented on this Appeal reaches the proportion of being of grave public importance when State and lower Federal Courts have allowed a private commercial publishing house to rate an officer of the court, sworn and dedicated to serving his clients and the public, to be rated as to his legal ability in a manner that materially effects his employment without that lawyer being able to dispute that information or show that the information in his file can no longer be verified so as to require this information to be deleted from his file under the provisions of the Act.

Public interest also demands that a system, such as that operated by

Martindale, that to date has functioned outside of the protective provisions of the Fair Credit Reporting Act, submit to the protective provisions of this Act, or, if Martindale chooses not to do so, Martindale can discontinue ratings given to lawyers - the only profession that has allowed a commercial publishing house to rate its members. This is particularly appropriate in view of present day Law School Standards and Bar Admission Requirements throughout these United States. A system that allows the "Black Listing" of a lawyer with the explanation that that lawyer does not "fully" confirm a "b" rating, as stated by Martindale in the responses it did give to Bergen's Interrogatories, a rating that he already had and continued to have all along without interruption, and thus be denied an application to be listed in its Biographical Section allowed all other

"b" lawyers that spells out background for employment, should not be condoned.

Today's lawyer not only should meet the general academic requirements of an Acredited Law School, as is now required, but should be Board Certified after passing examinations in their specialty fields, if they want to specialize, and if they are going to enter the Courthouse arena and be Trial Court Advocates - or appear in Appellate Courts - they should be first approved by a Credentials Committee, all under rules promulgated by the appropriate State Courts - or this Court- controlling the practice of law. Then the public would know who are the so-called "a" lawyers - and that is how the public would be best served; not by a commerical publishing house that profits from their publication of ratings based on the whims of other lawyers who are, for the most part, motivated by

considerations other than what is to the best interest of the public, and then by the whims of the editors of Martindale. Martindale-Hubbell has absolutely no standing to publish a rating on anybody, least of all on the members of our honorable profession; and it is nothing short of incredible that the legal profession, as a whole, and the lower courts generally have permitted this unfair practice.

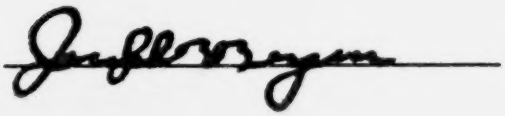
Consequently, it is urgently suggested that this Supreme Court has in this case an opportunity to require the implimenting of a system similar to that controlling the medical profession to assure the competentcy of our legal practitioners in a manner that will best serve both the legal profession and the public at large, while at the same time providing the immediate remedy to which this Appellant is entitled and which he

seeks under the provisions of the Fair Credit Reporting Act.

Dated: June 19, 1986.

Respectfully submitted,

JOSEPH B. BERGEN
Attorney of Record
for Appellant
Appearing Pro Se



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APPENDIX "A"

IN THE SUPERIOR COURT
FOR THE COUNTY OF CHATHAM
EASTERN JUDICIAL CIRCUIT
STATE OF GEORGIA

JOSEPH B. BERGEN, J.D., Attorney at Law, Individually and on behalf of all other Attorneys in the State of Georgia similarly situated,	]	
Plaintiff,	]	CIVIL ACTION NO 14184-H
v.	]	
MARTINDALE-HUBBELL, INC.,	]	
Defendant.	]	

ORDER ON DEFENDANT'S MOTION FOR JUDGMENT ON PLEADINGS

The Motion filed by Defendant for Judgment on the Pleadings having come on to be heard and after consideration thereof,

IT IS HEREBY ORDERED that the Motion for Judgment on the Pleadings filed by the Defendant be and the same is hereby granted.

This 21st day of January, 1985.

/s/DUNBAR HARRISON
Senior Judge
Superior Courts
Of Georgia

APPENDIX "B"

IN THE SUPERIOR COURT
FOR THE COUNTY OF CHATHAM
EASTERN JUDICIAL CIRCUIT
STATE OF GEORGIA

JOSEPH B. BERGEN, J.D., Attorney at Law, Individually and on behalf of all other Attorneys in the State of Georgia similarly situated,	]	
Plaintiff,	]	CIVIL ACTION NO 14184-H
v.	]	
MARTINDALE-HUBBELL, INC.,	]	
Defendant.	]	

ORDER ON PLAINTIFF'S MOTION FOR PARTIAL JUDGMENT ON PLEADINGS AS TO LIABILITY ON COUNT II

The Motion filed by plaintiff for Partial Judgment on the Pleadings as to Liability on Count II of his Complaint having come on to be heard and after consideration thereof,

IT IS HEREBY ORDERED that the Motion for Partial Judgment on the Pleadings as to Liability on Count II filed by plaintiff be and the same is hereby

denied.

This 21st day of January, 1985.

/s/ DUNBAR HARRISON
Senior Judge
Superior Courts
Of Georgia

APPENDIX "C"

IN THE COURT OF APPEALS OF GEORGIA

70441. BERGEN V. MARTINDALE-HUBBELL, INC. BENHAM, Judge.

October 23, 1985

This is the third appearance of this case in the appellate courts. See 245 Ga. 742 (267 SE2d 10) (1980); 248 Ga. 599 (285 SE2d 6) (1981). The only claims remaining at the time of the judgment complained of in this appeal were based on libel and the Fair Credit Reporting Act (FCRA) (15 USCA Section 1681). The claim of violation of the FCRA is based on appellee's refusal to disclose to appellant the records on which it bases the ratings of legal ability which appear in the legal directory appellee publishes. The basis of the libel action is that appellant was assigned a rating of "bv" rather than "av", the highest rating available. On this appeal, appellant enumerates as error the grant

of judgment on the pleadings to appellee, the denial of partial judgment on the pleadings for appellant, and the trial court's failure to compel discovery before entering judgment.

1. "To justify the grant of a judgment on the pleadings it is not sufficient that the complaint fails to state a claim on which relief can be granted, but the pleadings must affirmatively show that no claim in fact exists. [Cit.]" Holzman v. Nat. Bank of Ga., 144 Ga. App. 710 (1) (242 SE2d 299) (1978).

2. In order for appellant to prevail on his claim under the FCRA, appellee must be a "consumer reporting agency" since the disclosure requirements alleged to have been violated apply only to "consumer reporting agencies." 15 USCA Section 1681g. "The term 'consumer reporting agency' means any person which,

for monetary fees, dues, or on a cooperative non-profit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumèrs for the purpose of furnishing consumer reports to third parties. . ." 15 USCA 1681a (f). "The term 'consumer report' means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. . ." 15 USCA Section 1681a (d).

As may be seen from the definitions quoted above, appellee may be considered a consumer reporting agency and thuys subject to the disclosure requirements of the FCRA, only if it furnishes consumer reports, that is, only if it furnishes

information "bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." The pleadings in the record before us do not allege that appellee furnishes such information. Appellant's complaint alleges, and appellee admits, that the rating of which appellant complains deals with legal ability. The reating does not purport to concern any aspect of appellant's credit, general reputation, personal characteristics or mode of living. As appellant himself alleges in his pleadings, the rating is based on a "consensus of opinion as to legal ability." We hold, therefore, that under the allegations of the pleadings, appellee's publication does not constitute a "consumer report" within the meaning of the FCRA; that appellee is

not, therefore, a "consumer reporting agency" and is not subject to the disclosure provisions of the FCRA. That being so, the pleadings show that no claim against appellee exists under the FCRA. The grant to appellee of judgment on the pleadings on appellant's claim under the FCRA and the concomitant denial of appellant's motion for partial judgment on the pleadings on that issue were correct. Holzman, supra.

3. Appellant's libel action is based on the publication of what he alleges in his complaint to be an opinion of his legal ability in comparison to that of other attorneys. The expression of opinion on "matters with respect to which reasonable men might entertain differing opinions" Grayson v. Savannah News-Press, 110 Ga. App. 561, 568 (139 SE2d 347) (1964)) is not libelous. The relative abilities of different lawyers

is patently such a matter, wholly subjective and not capable of proof or disproof. Appellee here is entitled, as was the appellee in Grayson, to express such opinions. "An assertion that cannot be proven false cannot be libelous. A writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be. [Cits.]" Hotchner v. Castillo-Puche, 551 F2d 910, 913 (1977). "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (94 SC 2997, 41 LE2d 789) (1974).

Since what appellant contends was libel was a statement of opinion which, as the cases cited above hold, cannot be libel, appellant's pleadings show that no

claim for libel exists in this case. Accordingly, the trial court did not err in granting appellee's motion for judgment on the pleadings on appellant's libel claim. Holzman, supra.

4. Appellant's third enumeration of error is that the trial court erred in "failing to rule on the failing to deny defendant's objections to plaintiff's interrogatories. . ." Our review of the record shows that appellant served interrogatories on appellee, and appellee answered some of them and objected to the rest. So far as the record shows, that was the end of the matter, there being nothing in the record to show that appellant availed himself of the opportunity provided in OCGA Section 9-11-33(a)(2) to move for an order under OCGA Section 9-11-37(a) with respect to the objections. There having been no invocation by appellant of the trial

court's authority in this matter, we find no error in the trial court's nonaction with repect thereto. Cf. Clements v. Toombs County Hosp. Auth., 175 Ga. App. 651(1) (SE2d) (1985).

Judgment affirmed. Banke, C. J., and McMurray, P.J., concur.

APPENDIX "D"

1404

COURT OF APPEALS

OF THE STATE OF GEORGIA

ATLANTA, November 7, 1985

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

70441 Joseph B. Bergen, et al v. Martindale-Hubble, Inc.

(14184-H)

Upon consideration of the motion for rehearing filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA

November 7, 1985

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ ALTON HAWK, Clerk

APPENDIX "E"

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta JAN 8, 1986

Case No. 42971, Bergen et al. v. Martindale-Hubble, Inc.

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur, except Smith, J. who dissents.

Very truly yours,

JOLINE B. WILLIAMS,

APPENDIX "F"

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta JAN 28, 1986

The motion for rehearing was denied today:

Case No. 42971, Bergen et al. v. Martindale-Hubble, Inc.

Very truly yours,

JOLINE B. WILLIAMS,

Clerk

APPENDIX "H"

IN THE COURT OF APPEALS OF GEORGIA

CASE NO. 70441

JOSEPH B. BERGEN, J.D.,
Attorney at Law, Individually,
and on behalf of all other
attorneys in the State of
Georgia similarly situated,

Appellant

v.

MARTINDALE-HUBBELL, INC.,

Appellee

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

JOSEPH B. BERGEN
Attorney at Law
Appearing Pro Se

COLUMBIA SQUARE LAW OFFICES
125-127 Habersham Street
Savannah, Georgia 31401
Telephone: (912) 233-6600

I. Notice is hereby given that JOSEPH B. BERGEN, the appellant in the above styled case, hereby appeals to the Supreme Court of the United States from the final judgment entered by the Court of Appeals of Georgia on October 23, 1985 following which rehearing was denied by the Court of Appeals of Georgia on November 7, 1985 an Application for Writ of Certiorari in the Supreme Court of Georgia was denied by the Supreme Court of Georgia on January 8, 1986, upon which rehearing was denied by the Supreme Court of Georgia on January 28, 1986. The decision of the Court of Appeals of Georgia affirmed a final Judgment on the Pleadings entered by the Superior Court of Chatham County, Georgia on May 21, 1984 denying a claim of appellant that the appellee violated provisions of the Fair Credit Reporting Act codified in Title 15, USC Section 1681, et seq. in

compiling and publishing information regarding the legal ability of the appellant by the appellee failing to furnish appellant with information in their files relating to appellant's rating as to his legal ability published by the appellee as requested by appellant under the provisions of this Act.

II. The appellant appeals from the Judgment of the Court of Appeals of Georgia entered on October 23, 1985 that became a final judgment on January 28, 1986 upon denial of rehearing on the Writ of Certiorari Application made by the Supreme Court of Georgia, pursuant to Title 28 USC Section 1257(1) on the ground that this decision of the Court of Appeals of Georgia was contrary to the provisions and requirements of the Fair Credit Reporting Act codified in Title 15, USC 1681, et seq. and draws into question the validity of the provisions

of this statute and the decision is against its validity.

III. The Clerk of the Supreme Court of Georgia will please prepare the entire record in this cause and certify said record and provide for the transmission of this record to the Clerk of the Supreme Court of the United States and include in said record the following:

1. Complaint of plaintiff dated December 15, 1978.

2. Amendment to Complaint dated January 16, 1979.

3. Second Amendment to Complaint filed February 29, 1979.

4. Third Amendment to Complaint filed December 26, 1980.

5. Fourth Amendment to Complaint filed December 21, 1984.

6. Answer of Defendant MARTINDALE-HUBBELL, INC. filed November 16, 1979.

7. Motion for Judgment on Pleadings filed by defendant on December 18, 1984.

8. Order granting defendant's Motion for Judgment on the Pleadings entered January 21, 1985.

9. Decision of the Court of Appeals of Georgia entered October 23, 1985.

There is no transcript included in the record on appeal as there was no transcript made of any proceedings herein.

Dated: April 15, 1986.

JOSEPH B. BERGEN
Attorney at Law
Appearing Pro Se

/s/ Joseph B. Bergen

COLUMBIA SQUARE LAW OFFICES
125-127 Habersham Street
Savannah, Georgia 31401
Telephone: (912) 233-6600

PROOF OF SERVICE

I, the undersigned JOSEPH B. BERGEN, attorney of record in the foregoing case appearing Pro Se and a member of the Bar of the Supreme Court of the United States depose and say that on the 15th day of April, 1986 I served three copies of the foregoing Notice of Appeal to the Supreme Court of Georgia on WALTER C. HARTRIDGE,III, ESQ., attorney of record for the appellee herein whose post office address is: Post Office Box 2139, Savannah, Georgia 31498, and also on the HONORABLE ALTON L. HAWK, Clerk of the Court of Appeals of Georgia whose post office address is: 433 State Judicial Building, Atlanta, Georgia 30334, who are all the parties required to be served with this notice, by placing a copy of said Notice of Appeal in an authorized depository for mail at a

United States Post Office at Savannah, Georgia in a properly addressed envelope with sufficient prepaid postage thereon to insure first class delivery to the said WALTER C. HARTRIDGE, III, ESQ. and certified mail delivery to the HONORABLE ALTON L. HAWK, within the time allowed for filing.

This 15th day of April, 1986.

JOSEPH B. BERGEN
Attorney at Law
Appearing Pro Se for
Appellant

/s/ Joseph B. Bergen

Sworn to and Subscribe to before me

This 15th day of April, 1986.

/s/ Virginia B. Bergen
VIRGINIA B. BERGEN
Notary Public, Georgia
[Notary Seal]
My Commission Expires: September 8, 1987.

APPENDIX "H"

IN THE COURT OF APPEALS OF GEORGIA

CASE NO. 70441

JOSEPH B. BERGEN, J.D.,
Attorney at Law, Individually,
and on behalf of all other
attorneys in the State of
Georgia similarly situated,

Appellant

v.

MARTINDALE-HUBBELL, INC.,

Appellee

AMENDMENT TO NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

JOSEPH B. BERGEN
Attorney at Law
Appearing Pro Se

COLUMBIA SQUARE LAW OFFICES
125-127 Habersham Street
Savannah, Georgia 31401
Telephone: (912) 233-6600

NOW COMES JOSEPH B. BERGEN, the appellant in the above styled case and amends his Notice of Appeal to the Supreme Court of the United States heretofore filed on April 15, 1986 to add the additional portion of the record to be certified and transmitted to the Clerk of the Supreme of the United States, to wit:

1. Motion for Partial Judgment on the Pleadings as to Liability on Count II filed by plaintiff dated December 21, 1984.

2. Order denying plaintiff's Motion for Partial Judgment on the Pleadings as to Liability on Count II dated January 21, 1985.

Dated: April 24, 1986.

JOSEPH B. BERGEN
Attorney at Law
Appearing Pro Se

/s/ Joseph B. Bergen

COLUMBIA SQUARE LAW OFFICES
125-127 Habersham Street
Savannah, Georgia 31401
Telephone: (912) 233-6600

PROOF OF SERVICE

I, the undersigned JOSEPH B. BERGEN, attorney of record in the foregoing case appearing Pro Se and a member of the Bar of the Supreme Court of the United States depose and say that on the 24th day of April, 1986 I served three copies of the foregoing Amendment to the Notice of Appeal to the Supreme Court of Georgia on WALTER C. HARTRIDGE,III, ESQ., attorney of record for the appellee herein whose post office address is: Post Office Box 2139, Savannah, Georgia 31498, and also on the HONORABLE ALTON L. HAWK, Clerk of the Court of Appeals of Georgia whose post office address is: 433 State Judicial Building, Atlanta, Georgia 30334, who are all the parties required to be served with this notice, by placing a copy of said Amendment to the Notice of Appeal in

an authorized depository for mail at a United States Post Office at Savannah, Georgia in a properly addressed envelope with sufficient prepaid postage thereon to insure first class delivery to the said WALTER C. HARTRIDGE, III, ESQ. and certified mail delivery to the HONORABLE ALTON L. HAWK, within the time allowed for filing.

This 24th day of April, 1986.

JOSEPH B. BERGEN
Attorney at Law
Appearing Pro Se
for Appellant

/s/ Joseph B. Bergen

Sworn to and Subscribe to before me

This 24th day of April, 1986.

/s/ Virginia B. Bergen
VIRGINIA B. BERGEN
Notary Public, Georgia
[Notary Seal]
My Commission Expires: September 8, 1987.

APPENDIX "I"

ENTRY OF APPEARANCE

SUPREME COURT OF THE UNITED STATES

NO._____

JOSEPH B. BERGEN, J.D.,
Attorney at Law, Individually,
and on behalf of all other
attorneys in the State of
Georgia similarly situated,

Appellant

v.

MARTINDALE-HUBBELL, INC.,

Appellee

JOSEPH B. BERGEN

COLUMBIA SQUARE LAW OFFICES
125-127 Habersham Street
Savannah, Georgia 31401
Telephone: (912) 233-6600

The Clerk will please enter my appearance as counsel for the above appellant, JOSEPH B. BERGEN, J.D., Attorney at Law, Individually and on the behalf of all other attorneys in the State of Georgia similarly situated.

I certify that I am a member of the Bar of the Supreme Court of the United States.

Dated: April 15, 1986.

JOSEPH B. BERGEN
Attorney at Law

/s/ Joseph B. Bergen

COLUMBIA SQUARE LAW OFFICES
125-127 Habersham Street
Savannah, Georgia 31401
Telephone: (912) 233-6600

PROOF OF SERVICE

I, the undersigned JOSEPH B. BERGEN, attorney of record in the foregoing case appearing Pro Se and a member of the Bar of the Supreme Court of the United States depose and say that on the 15th day of April, 1986 I served three copies of the foregoing Entry of Appearance to the Supreme Court of Georgia on WALTER C. HARTRIDGE,III, ESQ., attorney of record for the appellee herein whose post office address is: Post Office Box 2139, Savannah, Georgia 31498, the party required to be served with this entry, by placing a copy of said Entry of Appearance in an authorized depository for mail at a United States Post Office at Savannah, Georgia in a properly addressed envelope with sufficient prepaid postage thereon to insure first class within the time allowed for filing.

This 15th day of April, 1986.

JOSEPH B. BERGEN
Attorney at Law
Appearing Pro Se
for Appellant

/s/ Joseph B. Bergen

Sworn to and Subscribe to before me

This 15th day of April, 1986.

/s/ Virginia B. Bergen
VIRGINIA B. BERGEN
Notary Public, Georgia
[Notary Seal]
My Commission Expires: September 8, 1987.

APPENDIX "J"

SUPREME COURT OF THE UNITED STATES

NO. A-796

JOSEPH B. BERGEN,
Applicant,
v.
MARTINDALE-HUBBELL, INC.

ORDER

UPON CONSIDERATION of the application of applicant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including June 27, 1986.

/s/ LEWIS F. POWELL, JR.
Associate Justice of the
Supreme Court of the
United States

Dated this 21st
day of April, 1986.

APPENDIX "K"
FCRA
Sections Involved

Congressional Findings and Statement of Purposes relating to fair credit reporting agencies, under what is commonly known as the Fair Credit Act, as recited in 15 USC 1681, the pertinent part of which is as follows, states:

"(a)(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers. [and that]
"(4) There is a need to insure that consumer reporting agencies exercise their grave responsibility with fairness, impartiality and a respect for the consumer's right to privacy. [and also]
"(b) It is the purpose of this subchapter [of the Act] to insure that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance and other information in a manner that is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter."

Title 15 USC 1681(d), the pertinent part of which, states:

"The term 'consumer report' means

any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor and establishing the consumer's eligibility ..., for (2) Employment, or (3) other privileges authorized under Section 1681b of this Title."

Pertinent part of subparagraph (e) of this section states:

"The term 'investigative consumer report' means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information."

The pertinent part of subparagraph (f) of said section states:

"The term 'consumer reporting agency' means any person which, for monetary fees, dues, or on a competitive non-profit bases, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and

which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports."

Subparagraph (g) of this section states:

"(g) The term 'file' when used in connection with information on any consumer, means all the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored."

Pertinent part of subparagraph (h) states:

"The term 'employment purposes' when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or a retention as an employee."

The Act then provides in Section 1681g. that:

"(a) Every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and adequately disclose to the consumer: (1) The nature and substance of all information (except medical information) in its files on the consumer at the time of the request."

Procedures under the Act in case of disputed accuracy set out in Section 1681i. the pertinent part of which

states:

"(a) If the completeness or accuracy of any item or information contained in his file is disputed by a consumer, and such dispute is directly conveyed to the consumer reporting agency by the consumer, the consumer reporting agency shall within a reasonable period of time reinvestigate and record the current status of that information unless it has reasonable grounds to believe that the dispute by the consumer is frivolous or irrelevant. If after such investigation such information is found to be inaccurate or can no longer be verified, the consumer reporting agency shall promptly delete such information. The presence of contradictory information in the consumer report does not and of itself constitute reasonable grounds for believing the dispute is frivolous or irrelevant." [and]

"(b) If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute."

The Act provides in Section 1681(n), the pertinent part of which is as follows:

"Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to the consumer in an amount equal to the sum of - (1) any actual damages sustained by the consumer as a result of the failure; (2) such an amount of punitive damages as the court may allow; and, (3) in the case of any successive action to inforce any

liability under this section, the cost of the action together with reasonable attorney's fees as determined by the court."

APPENDIX "L"

PROOF OF FILING AND SERVICE

I, the undersigned JOSEPH B. BERGEN, Attorney of Record for the Appellant, appearing Pro Se, and a member of the Bar of the Supreme Court of the United States, deposes and says that on the 25th day of June, 1986, I filed 40 copies of the foregoing JURISDICTIONAL STATEMENT to the Supreme Court of the United States with the Clerk of the Supreme Court of the United States and I served three copies of this JURISDICTIONAL STATEMENT to the Superme Court of the United States on and Walter C. Hartride, III, Esq. Attorney for Appellee, whose Post Office Address is: Post Office Box 2139, Savannah, Georgia 31498, who are all the parties required to be served, by causing to be placed these copies of said JURISDICTIONAL STATMENT in an authorized depository for mail at the United States

Post Office at Atlanta, Georgia in a properly addressed envelope with sufficient prepaid postage thereon to insure First Class Certified Mail delivery within the time allowed for such filing.

This 25th day of June, 1986.

JOSEPH B. BERGEN
Attorney for Appellant
Appearing Pro Se

Sworn to and subscribed to before me
This 25th day of June, 1986.

Virginia Blake Bergen
Notary Public, Georgia
[SEAL]
My Commission Expires: September 8, 1987.

85-2129

Supreme Court, U.S.
FILED
JUL 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. A-796

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

JOSEPH B. BERGEN, J.D., Attorney at Law, Individually, and on Behalf of All Other Attorneys in the State of Georgia Similarly Situated,

Appellant,

VS.

MARTINDALE-HUBBELL, INC.,

Appellee.

ON APPEAL FROM
THE COURT OF APPEALS AND
THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS

ALAN S. GAYNOR
Bouhan, Williams,
and Levy
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Post Office Box 2139
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52pp

I. TABLE OF CONTENTS

		PAGE
I	Table of Contents	i
II	Statement of Facts	1
III	Grounds for Dismissal	6
IV	Argument and Citation of Authority	6
V	Conclusion	27

Appendix A, Opinion of Court of Appeals of Georgia

Appendix B, Relevant Sections of the Fair Credit Reporting Act

Appendix C, Affidavit

Appendix D, Proof of Filing and Service

TABLE OF AUTHORITIES

PAGE

CODE SECTIONS:

15 U.S.C. Sec. 1681 . . . . . 4, 11, 12, 13, 15, 18, 20, 26

28 U.S.C. Sec. 1257 . . . . . 8, 10

CASES:

PAGE

Boothe v. TRW Credit Data, 523 F. Supp. 631, 633 (S.D. N.Y. 1981). 15, 23

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) 26

Buckley v. Littell, 529 F.2d 882, 894, (2nd Cir. 1976), cert. denied, 429 U.S. 1062 (1977) 26

Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. ____, 86 L. Ed. 2d 593 (1985). 25

Flournoy v. Weiner, 321 U.S. 253, 263 (1943) 8

Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (94 SC 2997, 41 LE2d 789) (1974) 24

Hoke v. Retail Credit Corp., 521 F. 2d 1079 (4th Cir. 1975). 16

Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 289-290 (1958) 9

Matthews v. Northern Bank & Trust Co., 741 F.2d 217, 219-220 (8th Cir. 1984) 15, 23

Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390 (1952) 10

Porter v. Talbot Perkins Childrens Service, 355 F. Supp. 174 (S.D. N.Y. 1973). 16

St. Louis, I.M. & S.R. Co. v. Taylor, 210 U.S. 281, 293 (1907) 9

Sizemore v. Bambi Leasing Corp., 360 F. Supp. 252 (N.D. Ga. 1973) 15, 23

Todd v. Associated Credit Bureau Services, Inc., 451 F. Supp. 447 (E.D. Pa. 1977) 15

Wrigley v. Dun & Bradstreet, Inc., 375 F. Supp. 969 (N.D. Ga. 1974) 15, 16

Zucht v. King, 260 U.S. 174 (1922) . 10

OTHER CASES:

16 Cong. Record 36, 572 (1970) . 15, 16

R. Sack, Libel, Slander, and Related Problems, 154 (1980) 25

II. STATEMENT OF FACTS

It must be emphasized at the outset that, contrary to the implication in the style of the case chosen by the Appellant/Petitioner, this case has never been certified as a class action and Mr. Bergen, therefore, stands before this Court on his own behalf and not as the certified representative of any class.

It is uncontested that the Appellee/Respondent Martindale-Hubbell, Inc.* is a commercial publishing house engaged in the business of compiling, publishing and distributing a law list and directory of attorneys at law who are assigned a "rating" as to their legal ability of "a" ("very high"); "b" ("high)' "c" ("fair"); or, no assigned

---

*In compliance with Rule 28.1 of the Rules of this Court, Appellee/Respondent shows that it has no parent company, subsidiaries (except wholly owned subsidiaries) or affiliates.

rating at all as to legal ability (Paragraph 13 of Plaintiff's Complaint). As shown by the Appellee/Respondent's verified Answer, when a rating of "a", "b", or "c" is published, it is always with the letter "v" - "very high", the General Recommendations rating which embraces faithful adherence to ethical standards, professional reliability and diligence and other pertinent factors. No rating whatsoever is published unless the file supports a "v" (Paragraph 13 under Seventeenth Defense of Answer). Appellant/Petitioner at all times relevant hereto has been listed with a "bv" rating and complains that the Appellee/Respondent has refused to assign him "an 'a' rating, notwithstanding the fact that his legal ability is 'very high,'. . . ." Appellee/Respondent's verified answer shows that the ratings

published in its Directory are not simply assigned or "given" by it, but rather reflect a consensus of the recommendations it receives from lawyers and members of the Judiciary through responses to confidential questionnaires.

In paragraph 34 of his Complaint, Appellant/Petitioner asserts that the rating system administered by the Appellee/Respondent under which Appellant/Petitioner was given a "bv" as opposed to an "av" rating, has "libeled and defamed Plaintiff . . . in a manner that is intended to injure his reputation as an attorney with reference to his profession as an attorney at law . . . ."

In regard to the Fair Credit Reporting Act, Appellant/Petitioner alleges that the Appellee/Respondent has failed to disclose the nature and substance of all information in its files

on Appellant/Petitioner together with the sources of the information in violation of 15 U.S.C. Sec. 1681(g) and 1681(h). Appellant/Petitioner seeks damages for the failure of the Appellee/Respondent to disclose the information in its files and also seeks to review such information.

The Appellee/Respondent moved for judgment on the pleadings with regard to the Plaintiff's allegations and Appellant/Petitioner filed a cross-motion for judgment as to Count II of his Complaint seeking relief under the Fair Credit Reporting Act. On January 21, 1985, the trial court entered separate orders granting the Appellee/Respondent's motion and denying the Appellant/Petitioner's motion.

On October 23, 1985, the Court of Appeals of Georgie entered its decision affirming the judgment of the trial

court. That opinion is attached hereto as Appendix "A". It is clear from the text of its order that the Court of Appeals of Georgia did not explicitly call into question the constitutionality of the Fair Credit Reporting Act or any other federal statute. The Court of Appeals of Georgia merely construed that act so as to deny the Appellant/Petitioner's claim for relief. The Court of Appeals of Georgia also rejected Appellant/Petitioner's claim of libel. The Appellant/Petitioner's petition for a writ of certiorari to the Georgia Court of Appeals was rejected by the Georgia Supreme Court on January 8, 1986 and subsequently the Appellant/Petitioner's motion for rehearing before the Georgia Supreme Court was denied on January 28, 1986.

III. GROUNDS FOR DISMISSAL

The Appellee/Respondent shows that the Appellant/Petitioner's current appeal must be dismissed on the following grounds:

1. The decision of the Georgia Court of Appeals at issue did not call into question the validity of any federal statute.

2. The Appellant/Petitioner's appeal does not present a substantial federal question.

IV. ARGUMENT AND CITATION OF AUTHORITY

A. The decision of the Georgia Court of Appeals at issue did not call into question the validity of any federal statute.

In its opinion entered on October 23, 1985, the Court of Appeals of Georgia

found that the Appellee/Respondent's publication does not constitute a "consumer report" within the meaning of the Fair Credit Reporting Act in that the Appellee/Respondent is not a "consumer reporting agency" so as to be subject to the disclosure provisions of the Fair Credit Reporting Act. The Court of Appeals of Georgia thus found that the grant to Appellee/Respondent of judgment on the pleadings on Appellant/Petitioner's claims under the Fair Credit Reporting Act and a concomitant denial of Appellant/Petitioner's motion for partial judgment on the pleadings on that issue were correct.

Appellant/Petitioner seeks to appeal the decision of the Georgia Court of Appeals and the denial of the writ of certiorari by the Georgia Supreme Court

pursuant to 28 U.S.C. Sec. 1257 which states in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

To be appealable, a state court decision must hold that a treaty or statute of the United States is invalid in whole or in part as applied to particular circumstances of a case. Flournoy v. Weiner, 321 U.S. 253, 263 (1943). It is not enough that the state court merely construes the treaty or statue so as to deny a claim thereunder or that it views the facts so as to place

the litigant outside the scope of the federal law. Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 289-290 (1958). Moreover, a state decision construing a federal statute may only be reviewed by certiorari pursuant to 28 U.S.C. Sec. 1257 (3) to the extent that it presumes to reject a right, privilege, or immunity under federal law. See St. Louis, I.M. & S.R. Co. v. Taylor, 210 U.S. 281, 293 (1907).

Thus, it is absolutely apparent from a review of the Georgia Court of Appeals decision that the direct appeal being attempted by the Appellant/Petitioner is inappropriate and, therefore, must be dismissed.

(B) The Appellant/Petitioner's appeal does not present a substantial federal question.

It is essential to jurisdiction of the Supreme Court under 28 U.S.C. Sec. 1257 that a substantial federal question was properly raised in the state court proceedings. An alleged federal question which is devoid of merit will not confer jurisdiction on this Honorable Court and the lack of a substantial federal question is cause for the dismissal of an appeal or for denial of a petition for writ of certiorari. Zucht v. King, 260 U.S. 174 (1922); Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390 (1952). Since it is absolutely clear that the Appellant/Petitioner may not proceed by direct appeal in this case, he may obtain review, if at all, only through a petition for writ of certiorari. Appellee/Respondent shows that even if Appellant/Petitioner's jurisdictional statement should be

construed as a petition for writ of certiorari, his contentions must be dismissed for lack of a substantial federal question.

The purpose of the Fair Credit Reporting Act is stated in 15 U.S.C. Sec. 1681(b), the language of which is reproduced in Appendix "B" attached hereto.

In 15 U.S.C. Sec. 1681a(f), the term "consumer reporting agency" is defined and the relevant statutory language is reproduced in Appendix "B" attached hereto.

The term "consumer report" is defined in 15 U.S.C. Sec. 1681a(d) and that definition is reproduced in Appendix "B" attached hereto.

It is the position of the Appellee/Respondent that it is not a consumer reporting agency as defined under the Fair Credit Reporting Act and

that Appellant/Petitioner's allegations under the Fair Credit Reporting Act, therefore, must be dismissed.

As set forth in the statutory language referred to above, in order to be a "consumer reporting agency" within the meaning of the Fair Credit Reporting Act, an entity must assemble or evaluate information "for the purpose of furnishing consumer reports to third parties." 15 U.S.C. Sec. 1681a(f). Thus, status as a "consumer reporting agency" is dependent on the definition of the term "consumer report". The term "consumer report" means "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of

living . . ." 15 U.S.C. Sec. 168la(d). (emphasis supplied.)

In this case, the rating challenged by the Appellant/Petitioner does not bear on Appellant/Petitioner's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living. While some or even all of those categories might be relevant to the "v" rating, which encompasses faithful adherence to ethical standards and "other relevant factors," Appellant/Petitioner's Complaint cannot be construed to challenge that rating since it is undisputed that at all times he has been given a "v" rating and, therefore, has suffered no damage in regard to that rating, but rather has benefited from it. The gravamen of Appellant/Petitioner's Complaint is that he has been given a "b"

as opposed to an "a" rating for legal ability.

It must be recognized that the legal ability rating challenged by Appellant/Petitioner deals with Appellant/Petitioner's professional reputation as a lawyer as evaluated by his peers, not with his general personal reputation or any personal characteristic. A rating of legal ability, therefore, is clearly not defined as a consumer report within the meaning of the Act and the Appellee/Respondent's publishing of such a rating does not make it a "consumer reporting agency." The Fair Credit Reporting Act was based on a finding by Congress that "[i]naccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public

confidence which is essential to the continued functioning of the banking system." 15 U.S.C. Sec. 1681(a)(1). The lawyer rating system of the Appellee/Respondent has nothing to do with the banking system or consumer credit. The purpose of the Fair Credit Reporting Act was to protect consumers from inaccurate or arbitrary information in a consumer report in determining an individual's eligibility for credit, insurance or employment. 16 Cong. Record 36, 572 (1970). It does not apply to reports used for business, commercial or professional purposes. See Matthews v. Northern Bank & Trust Co., 741 F.2d 217, 219-220 (8th Cir. 1984); Boothe v. TRW Credit Data, 523 F. Supp. 631, 633 (S.D. N.Y. 1981); Todd v. Associated Credit Bureau Services, Inc., 451 F. Supp. 447 (E.D. Pa. 1977); Wrigley v. Dun &

Bradstreet, Inc., 375 F. Supp. 969 (N.D. Ga. 1974); Sizemore v. Bambi Leasing Corp., 360 F. Supp. 252 (N.D. Ga. 1973); Porter v. Talbot Perkins Childrens Service, 355 F. Supp. 174 (S.D. N.Y. 1973). Thus, the Act does not extend to Appellee/Respondent's ratings of professional ability and Appellant/Petitioner's allegations under the Fair Credit Reporting Act were properly dismissed by the trial court.

In attempting to argue that the Appellee/Respondent is a "consumer reporting agency" within the meaning of the Fair Credit Reporting Act, the Appellant/Petitioner relies heavily on the case of Hoke v. Retail Credit Corp., 521 F. 2d 1079 (4th Cir. 1975).

When carefully examined, the case of Hoke v. Retail Credit Corporation, 521 F.2d 1079 (4th Cir. 1975), a case that

has never been cited in any reported decision, must be viewed as standing alone both in its reasoning and in its factual setting. In Hoke, the plaintiff doctor sought damages under the Fair Credit Reporting Act for injuries allegedly sustained as the result of inaccurate information contained in a report issued by Retail Credit Corporation to the Texas Board of Medical Examiners. The Board had requested the report in regard to Dr. Hoke's application for a license to practice medicine in Texas. The court in Hoke found that:

> since the sine qua non to the practice of medicine in Texas, and elsewhere, is a license to practice medicine, and since the information furnished by Retail Credit related to the question of whether the

> license would be granted, [it must be concluded that] . . . . the information was furnished for "employment purposes" in the broad generic sense of the word.

Thus, the Fourth Circuit's analysis in Hoke, centered on the definition of "employment purposes" as defined under Sec. 168la(d) of the Fair Credit Reporting Act. In determining that the report done on Dr. Hoke was a "consumer report" the Court in Hoke did not deal with the threshold issue of whether the information provided by Retail Credit Corporation related to Dr. Hoke's "credit worthiness, credit standing, credit capacity, character, and general reputation, personal characteristics, or mode of living," as defined in 15 U.S.C. Sec. 168la(d). As reflected in the actual reports involved in the Hoke

litigation that were attached as Appendix "1"[1] to the Appellee/Respondent's supplemental brief in the Georgia Court of Appeals, the information contained in the report supplied by Retail Credit Corporation clearly dealt with Dr. Hoke's credit history and personal characteristics. As noted above, however, the legal ability rating given by the Appellee/Respondent deals with Appellant/Petitioner's professional reputation as a lawyer as evaluated by his peers, not with his general personal reputation or any personal characteristics. Thus, regardless of whether the information collected by the

---

[1]The record of the Hoke case is presently being stored at the Federal Records Center in Atlanta, Georgia and is available for inspection there during regular business hours. Counsel for the Appellee/Respondent reviewed the record and secured certified copies of relevant excerpts which were submitted to the Georgia Court of Appeals.

Appellee/Respondent in this case was used in whole or in part for "employment purposes," that information is not a "consumer report" within the meaning of 15 U.S.C. Sec. 168la(d) since it does not satisfy the first portion of the definition of "consumer report" set forth in 15 U.S.C. Sec. 168la(d).

It further should be noted that as reflected in the Plaintiff's Complaint as amended in the Hoke litigation, the thrust of the plaintiff's allegations in that case was the reports compiled by Retail Credit Corporation contained false information. (A copy of the plaintiff's complaint as amended was attached as a portion of Appendix "2" to the Appellee/Respondent's supplemental brief in the Georgia Court of Appeals.) The present case involves opinions relating to the Appellant/Petitioner's legal

ability and not to matters of independently verifiable fact. The accuracy of opinions could never be tested. The copy of the Record On Appeal in the Hoke case, attached to the Appellee/Respondent's supplemental brief in the Georgia Court of Appeals as Appendix "2", clearly shows that the issues presented to this Court completely differ from the issues addressed by the Fourth Circuit Court of Appeals in Hoke. Specifically, the Plaintiff in Hoke alleged in paragraph VI of his original Complaint that:

> this Consumer Investigative Report contained groundless and inflammatory comments and calumny of such outrageous and preposterous proportions that the defendants would immediately be alerted to their falseness and would grasp and

understand the great potential harm and danger that such reports could do to the character and reputation, professional standing and fitness for licensing in the medical profession of the plaintiff.

The reports that were attached as Appendix "1" to Appellee/Respondent's supplemental brief in the Georgia Court of Appeals, particularly the report dated 8-4-71, link Dr. Hoke to drug trafficking, abortions and the mysterious deaths of Dr. Hoke's wife and business partner. These peculiar facts may very well explain the Fourth Circuit Court of Appeals' efforts to find some way to give Dr. Hoke his day in court. This Court, however, is not bound to follow a case that is analytically unsound and apparently tainted by its peculiar facts. The reasoning of the Eighth Circuit in

Matthews v. Northern Bank & Trust Company, 741 F.2d 217, 219-220 (8th Cir. 1984), the United States District Court for the Northern District of Georgia in Sizemore v. Bambi Leasing Corporation, 360 F.Supp. 252 (N.D. Ga. 1973), and the United States District Court for the Southern District of New York in Boothe v. TRW Credit Data, 523 F.Supp. 631 (S.D. N.Y. 1981), firmly grounded in legislative history of the Fair Credit Reporting Act and its purpose, are far more persuasive.

It is likewise apparent that any claim that the Appellant/Petitioner has concerning libel does not raise a substantial federal question reviewable by this Court by writ of certiorari. The decision of the Georgia Court of Appeals on this issue did not turn on any claimed right, privilege or immunity

under the Constitution. The Georgia Court of Appeals merely found that the statements made by the Appellee/Respondent were not libelous as a matter of Georgia law.

Assuming arguendo that a statement that a lawyer is possessed of good legal ability and character could somehow be construed as libelous, Appellee/Respondent would note, however, that under the First Amendment, an opinion cannot constitute libel. As noted by one commentator, in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (94 SC 2997, 41 LE2d 789) (1974):

> the Court asserted that as a matter of constitutional law there can be no such thing as a false idea or opinion. This principal, together with the implication in Gertz that only a falsehood can be defamatory,

> powerful syllogism: a defamation is actionable only if it is false; opinions cannot be false; therefore, opinions can never be actionable even if defamatory.

R. Sack, Libel, Slander, and Related Problems, 154 (1980). This syllogism is consistent with this Court's decision in Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. _____, 86 L.Ed. 2d 593 (1985).

Since Martindale-Hubbell, Inc. merely reported a consensus of opinion concerning Mr. Bergen's legal ability, there was no libelous publication as a matter of law. Any comment upon the legal ability of the Appellant/Petitioner which was reflected by the rating given by the Appellee/Respondent in its publication or by the individual evaluation sheets submitted to the

evaluation sheets submitted to the Appellee/Respondent by members of the Bar must be viewed as conveying "concepts whose content is so debatable, loose and varying," that they are clearly "within the realm of protected idea and opinion under Gertz." Buckley v. Littell, 539 F. 2d 882, 894, (2nd Cir. 1976), cert. denied, 429 U.S. 1062 (1977); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984).[1]

---

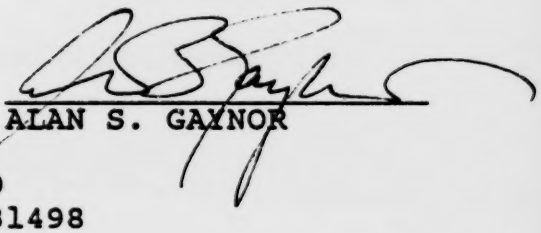
[1]Assuming arguendo, that Appellant/Petitioner could somehow set forth a claim for libel under the facts of this case, it must be emphasized that in addition to seeking damages for libel, Appellant/Petitioner also seeks to recover under the Fair Credit Reporting Act. Appellant/Petitioner may not assert both causes of action since his complaint does not allege that Martindale-Hubbell, Inc. has transmitted any information to third parties with malice or willful intent to injure the Appellant/Petitioner. 15 U.S.C. Sec. 1681h(e). It should also be noted that Appellant/Petitioner voluntarily subscribed to the Appellee/Respondent's publication and, therefore, consented to any statements contained in that publication.

V. CONCLUSION

Again, it must be clearly understood that this case has never been certified as a class action but is an action brought by one attorney who apparently seeks to substitute his own opinion of his legal ability for the opinions held by his peers. As shown above, there are no substantial issues for this Court's review.

Accordingly, Appellee/Respondent respectfully requests that the Appellant/Petitioner's appeal be dismissed for lack of jurisdiction or, to the extent that his jurisdictional statement can be construed as a petition for writ of certiorari, that said petition be denied.

Respectfully
Submitted,



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APPENDIX A

Oct 23 1985

IN THE COURT OF APPEALS OF GEORGIA

70441. BERGEN V. MARTINDALE-HUBBELL, INC.

BENHAM, Judge.

This is the third appearance of this case in the appellate courts. see 245 Ga. 742 (267 SE2d 10) (1980); 248 Ga. 599 (285 SE2d 6) (1981). The only claims remaining at thEtime of the judgment complained of in this appeal were based on libel and the Fair Credit Reporting Act (FCRA) (15 USCA Sec. 1681). The claim of violation of the FCRA is based on appellee's refusal to disclose to appellant the records on which it bases the ratings of legal ability which appear in the legal directory appellee publishes. The basis of the libel action is that appellant was assigned a rating

of "bv" rather than "av," the highest rating available. On this appeal, appellant enumerates as error the grant of judgment on the pleadings to appellee, the denial of partial judgment on the pleadings for apellant, and the trial court's failure to compel discovery before entering judgment.

1. "To justify the grant of a judgment on the pleadings it is not sufficient that the complaint fails to state a claim on which relief can be granted, but the pleadings must affirmatively show that no claim in fact exists. [Cit.]" Holzman v. Nat. Bank of Ga., 144 Ga. App. 710 (1) (242 SE2d 299) (1978).

2. In order for appellant to prevail on his claim under the FCRA, appellee must be a "consumer reporting agency" since the disclosure requirements

alleged to have been violated apply only to "consumer reporting agencies." 15 USCA Sec. 1681g. "The term 'consumer reporting agency' means any person which, for monetary fees, dues, or on a cooperative non-profit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. . ." 15 USCA 1681a (f). "The term 'consumer report' means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. . ." 15 USCA Sec. 1681a (d).

As may be seen from the definitions quoted above, appellee may be considered a consumer reporting agency and thus subject to the disclosure requirements of the FCRA, only if it furnishes consumer reports, that is, only if it furnishes information "bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." The pleadings in the record before us do not allege that appellee furnishes such information. Appellant's complaint alleges, and appellee admits, that the rating of which appellant complains deals with <u>legal ability</u>. The rating does not purport to concern any aspect of appellant's credit, general reputation, personal characteristics or mode of living. As appellant himself alleges in his

pleadings, the rating is based on a "consensus of opinion as to legal ability." We hold, therefore, that under the allegations of the pleadings, appellee's publication does not constitute a "consumer report" within the meaning of the FCRA; that appellee is not, therefore, a "consumer reporting agency" and is not subject to the disclosure provisions of the FCRA. That being so, the pleadings show that no claim against appellee exists under the FCRA. The grant to appellee of judgment on the pleadings on appellant's claim under the FCRA and the concomitant denial of the appellant's motion for partial judgment on the pleadings on that issue were correct. Holzman, supra.

3. Appellant's libel action is based on the publication of what he alleges in his complaint to be an opinion

of his legal ability in comparison to that of other attorneys. The expression of opinion on "matters with respect to which reasonable men might entertain differing opinions" (Grayson v. Savannah News-Press, 110 Ga. App. 561, 568 (139 SE2d 347) (1964)) is not libelous. The relative abilities of different lawyers is patently such a matter, wholly subjective and not capable of proof or disproof. Appellee here is entitled, as was the appellee in Grayson, to express such opinions. "An assertion that cannot be proven false cannot be libelous. A writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be. [Cits.]" Hotchner v. Castillo-Puche, 551 F2d 910, 913 (1977). "However pernicious an opinion may seem, we depend for its

correction not on the conscience of judges and juries but on the competition of other ideas." Gertz v. Robert Welch, Inc., 418 U. S. 323, 339 (94 SC 2997, 41 LE2d 789) (1974).

Since what appellant contends was libel was a statement of opinion which, as the cases cited above hold, cannot be libel, appellant's pleadings show that no claim for libel exists in this case. Accordingly, the trial court did not err in granting appellee's motion for judgment on the pleadings on appellant's libel claim. Holzman, supra.

4. Appellant's third enumeration of error is that the trial court erred in "failing to rule on and failing to deny defendant's objections to plaintiff's interrogatories. . ." Our review of the record shows that appellant served interrogatories on appellee, and appellee

answered some of them and objected to the rest. So far as the record shows, that was the end of the matter, there being nothing in the record to show that appellant availed himself of the opportunity provided in OCGA Sec. 9-11-33 (a) (2) to move for an order under OCGA Sec. 9-11-37 (a) with respect to the objections. There having been no invocation by appellant of the trial court's authority in this matter, we find no error in the trial court's nonaction with respect thereto. Cf. Clements v. Toombs County Hosp. Auth., 175 Ga. App. 651 (1) (SE2d) (1985).

Judgment affirmed. Banke, C. J., and McMurray, P. J., concur.

APPENDIX B

RELEVANT SECTIONS OF THE FAIR CREDIT REPORTING ACT FURNISHED IN THIS CASE

As reflected in 15 U.S.C. Sec. 1681(6) the purpose of the Fair Credit Reporting Act was to:

> require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

In enacting the Act, Congress made the following findings:

(1) The banking system is dependent

upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise

their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

15 U.S.C. Sec. 1681(a).

In 15 U.S.C. Sec. 1681a(f), the term "consumer reporting agency" is defined as:

> any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engaged in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

The term "consumer report" is defined in 15 U.S.C. Sec. 1681a(d) as follows:

> The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section

1681(b) of this title. The term does not include (A) any report containing information solely as to transactions or experiences between the consumer and the person making the report; (B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device; or (C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made and such person makes the disclosures to the consumer required

under section 1681(m) of this title. (Emphasis supplied.)

An "investigative consumer report", a species of consumer report, is defined by 15 U.S.C. Sec. 1681a(e) as:

> a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer

reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

APPENDIX C

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

JOSEPH B. BERGEN, J.D., Attorney at Law, Individually and on Behalf of All Other Attorneys in the State of Georgia Similarly Situated,	)	CASE NO. A-796 COURT OF APPEALS CASE NO. 70441
Appellant,	)	
vs.	)	
MARTINDALE-HUBBELL, INC.,	)	
Appellee.	)	

AFFIDAVIT

I, ALAN S. GAYNOR, hereby certify that on July 25th, 1986, Tower Printing Company, to the best of my knowledge, mailed 40 copies of the above entitled case, by first class mail, postage

prepaid, to the Clerk of this Court for filing.

Member of the United States Supreme Court Bar

Sworn and subscribed before me this 23 day of July, 1986.

NOTARY PUBLIC

ELAINE S. NELSON
Notary Public, Georgia, State at Large
My Commission Expires July 17, 1987

APPENDIX D

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1985

JOSEPH B. BERGEN, J.D., Attorney at Law, Individually and on Behalf of All Other Attorneys in the State of Georgia Similarly Situated,	)	CASE NO. A-796
Appellant,	)	COURT OF APPEALS CASE NO. 70441
vs.	)	
MARTINDALE-HUBBELL, INC.,	)	
Appellee.	)	

PROOF OF FILING AND SERVICE

I, the undersigned ALAN S. GAYNOR, attorney of record for the Appellee and a member of the Bar of the Supreme Court of the United States, deposes and says that on the 25th day of July, 1986, I filed 40 copies of the foregoing MOTION TO DISMISS to the Supreme Court of the

United States with the Clerk of the Supreme Court of the United States and I served three copies of this MOTION TO DISMISS to the Supreme Court of the United States on Joseph B. Bergen, Esq., Attorney for Appellant, whose address is: Columbia Square Law Offices, 125-127 Habersham Street, Savannah, Georgia 31401, who are all the parties required to be served, by causing to be placed these copies of said MOTION TO DISMISS in an authorized depository for mail at a United States Post Office in a properly addressed envelope with sufficient prepaid postage thereon to insure First Class Certified Mail delivery within the time allowed for such filing.

THIS 23 day of July, 1986

ALAN S. GAYNOR
Attorney for
Appellant

Sworn and subscribed
before me this 23
day of July, 1986.

NOTARY PUBLIC

ELAINE S. NELSON
Notary Public, Georgia, State at Large
My Commission Expires July 17, 1987

Supreme Court, U.S.
FILED
AUG 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

CASE NO. (A-796) 85-2129

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

JOSEPH B. BERGEN, J.D., Attorney at Law, Individually, and on Behalf of All Other Attorneys in the State of Georgia Similarly Situated,

Appellant,

VS.

MARTINDALE-HUBBELL, INC.,

Appellee.

RESPONSE TO APPELLEE'S MOTION TO DISMISS

ON APPEAL FROM
THE COURT OF APPEALS
AND
THE SUPREME COURT OF GEORGIA

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TABLE OF CONTENTS

	Page
Table of Contents.....	i
Response to Motion.....	1
Proof of Service.....	7

TABLE OF AUTHORITIES

Code Sections:	Page
Title 15 USC, 1681.....	2
28 USC, Section 1257.....	2
Title 28 USC Section 2103.....	3

Cases:	Page
Baltimore and PR Co. v. Hopkins, 130 U.S. 210, 32 L.Ed. 908, 9 S.Ct. 503 (1889).....	2
Ivanhoe Irrigation District v. McCracken, 357 US 275, 2 L.Ed. 2d 313, 78 S.Ct.1174 (1958), page 1324, Headnote 2-1325.....	4
United States v. Standard Oil, 332 US 301, 302, n. 2.....	5
U. S. v. Powell, 330 US 338.....	5
Cramp v. Board of Public Instruction, 366 US 934.....	6
Eaton v. Price, 346 US 246, 3 L.Ed.2d 1200, 70 S.Ct. 978...	6

RESPONSE TO MOTION TO DISMISS

NOW COMES the above styled Appellant, JOSEPH B. BERGEN, pursuant to Rule 16.5 and 42 of the Supreme Court of the United States and files this response and brief opposing Appellee's Motion to Dismiss.

The Appellee in their Motion to Dismiss Appellant's appeal assert as their grounds for dismissal the contention that:

1. The decision of the Georgia Court of Appeals at issue did not call into question the validity of any federal statute.

2. The Appellant's appeal does not present a substantial federal question.

ARGUMENT AND CITATION OF AUTHORITY

IN OPPOSITION TO MOTION

A. The decision of the Georgia Court of Appeals did call into question the validity of a federal statute.

The opinion entered on October 23, 1985 by the Court of Appeals of Georgia held that the Appellee's publication does not constitute a consumer report within the meaning of Title 15 USC Section 1681, et seq., which does, in fact, draw into question the validity of the Statute of the United States codified in this Code Section, and this decision is against it validity, thereby granting this Court jurisdiction of this appeal under 28 USC, Section 1257.

The Supreme Court in Baltimore and PR Co. v. Hopkins, 130 U.S. 210, 32 L.Ed. 908, 9 S.Ct. 503 (1889), held that the validity of a statute is drawn into question whenever the power to enact it, as it is by its terms, or as it is made to read by construction, is fairly open to denial and is denied.

The Georgia Court of Appeals ruling that Appellee's publication does not

constitute a consumer report within the meaning of Title 15 USC, Section 1681, et seq., denies to Appellant the disclosure provisions of the Fair Credit Reporting Act as set out in Title 15 USC, Section 1681, et seq., and, thereby, calls into question the validity of the statute as it is made to read by the construction given to it in this opinion under the Hopkins decision, supra.

However, should this Court determine that this appeal is improvidently taken from the decision of the Court of Appeals of Georgia which the Supreme Court of Georgia declined to review, as the proper mode of review of this case is by Petition for Certiorari, this appeal should be regarded and acted on as a Petition for Writ of Certiorari as if duly presented to the Supreme Court at the time the appeal was taken under the provisions of Title 28 USC Section 2103

since the importance of the case requires that certiorari be granted. Ivanhoe Irrigation District v. McCracken, 357 US 275, 2 L.Ed. 2d 313, 78 S.Ct.1174 (1958), Headnote 2, page 1324-1325.

B. The Appellant set out in Division VI, page 17 of its Jurisdictional Statement that the question presented have never been passed on by this Court and is of great public importance. The lower court decision in this case is so inconsistent in theory as to leave the intent and meaning of the Fair Credit Reporting Act in a state of confusion. The importance of this case is further demonstrated by the fact that the issue involved is a troublesome one, that is, numerous lawyers have from time to time brought suit against this same Appellee, Martindale-Hubble, Inc., in lower courts regarding the ratings assigned to lawyers by the Appellee

thereby making desirable a definite ruling by the Supreme Court on this issue. United States v. Standard Oil, 332 US 301, 302, n. 2; U. S. v. Powell, 330 US 338.

C. Consequently, the Court of Appeals of Georgia in holding that Appellee's publication is not a consumer report under the applicable provisions of Title 15 USC Section 1681, et seq., thereby denying the appellant the right to disclosure as provided by statute, clearly presents a substantial federal question to invoke the jurisdiction of the United States Supreme Court in either this pending appeal or by review on certiorari as this appeal may be regarded since the issues are of extraordinary national importance.

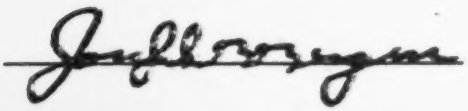
D. In the event the Supreme Court at this point is undecided on whether to note probable jurisdiction either on

appeal or by certiorari it is suggested that the Court delay this decision and allow the parties to fully brief the issues and argue the case before that decision is made on the jurisdiction issue and that an order postponing the determination of jurisdiction now be entered. Cramp v. Board of Public Instruction, 366 US 934. Ohio ex. rel. Eaton v. Price, 346 US 246, 3 L.Ed.2d 1200, 70 S.Ct. 978.

Dated: August 1, 1986.

Respectfully submitted,

JOSEPH B. BERGEN
Attorney at Law
Appearing Pro Se



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PROOF OF FILING AND SERVICE

I, the undersigned JOSEPH B. BERGEN, Attorney of Record for the Appellant, appearing Pro Se, and a member of the Bar of the Supreme Court of the United States, deposes and says that on the 4th day of August, 1986, I filed 40 copies of the foregoing Response to Appellee's Motion to Dismiss to the Supreme Court of the United States with the Clerk of the Supreme Court of the United States and I served three copies of this Response to Appellee's Motion to Dismiss to the Superme Court of the United States on Alan S. Gaynor, Esq. Attorney for Appellee, whose Post Office Address is: Post Office Box 2139, Savannah, Georgia 31498, who are all the parties required to be served, by causing to be placed these copies of said Response to Appellee's Motion to Dismiss in an authorized depository for mail at the

United States Post Office at Atlanta, Georgia in a properly addressed envelope with sufficient prepaid postage thereon to insure First Class Certified Mail delivery within the time allowed for such filing.

This 4th day of August, 1986.

JOSEPH B. BERGEN
Attorney for Appellant
Appearing Pro Se

Sworn to and subscribed to before me
This 4th day of August, 1986.

Virginia Blake Bergen
Notary Public, Georgia
[SEAL]
My Commission Expires: September 8, 1987.